Nos. 83-6381 and 83-1660
IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

GILL PARKER, et al.,
Petitioners
v.
JOHN R. BLOCK, Secretary
of Agriculture, et al.,
Respondents

CHARLES M. ATKINS, Commissioner of
the Massachusetts Department of
Public Welfare,
Petitioner
v.
GILL PARKER, et al.
Respondents

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF
APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE STATE PETITIONER

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QUESTIONS PRESENTED

1. Whether a notice from the Massachusetts Department of Public Welfare to more than 16,000 food stamp households, informing them of a federal statutory change in the earned income deduction and providing a detailed explanation of how to claim an appeal and correct any erroneous reduction or termination of benefits, satisfied the notice requirements of the Due Process Clause.

2. Whether the Court of Appeals erred in reviewing the findings of fact, which determined the constitutional question, under the "clearly erroneous" standard of Federal Rule of Civil Procedure 52(a), rather than under the rule of independent review.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provision

Page

Statutes

Page

Regulations

Miscellaneous

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is

reported at 722 F.2d 933 (1st Cir. 1983). The opinion of the United States District Court for the District of Massachusetts is unreported. Both opinions are reprinted in the Appendix to the petition for a writ of certiorari in No. 83-1660.[1/]

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the First Circuit was entered on December 7, 1983. Parker's petition for a writ of certiorari was received on March 9, 1984, and the Commissioner's cross-petition was filed on April 9, 1984. This Court

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1/ The Appendix to the Commissioner of Public Welfare's (Commissioner) petition for a writ of certiorari is referred to as "PA.". The Joint Appendix is referred to as "JA.".

granted both petitions on June 18, 1984.[2/]

CONSTITUTIONAL PROVISION AND RULE INVOLVED

Constitution of the United States, Amendment XIV, Due Process Clause:

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . ."

Federal Rules of Civil Procedure, Rule 52(a):

". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . . ."

2/ This brief addresses the questions presented in No. 83-1660. The Commissioner will address the questions presented in No. 83-6381 in a subsequent brief.

STATEMENT

1. This case involves the constitutionality of a notice mailed to more than 16,000 Massachusetts households, announcing an across-the-board change in one minor aspect of the Food Stamp Program. That change was mandated by Congress and had the effect of reducing each household's benefits by an average of five dollars per month.

The Food Stamp Program is a federally-funded program designed to increase the food purchasing power for low-income households. 7 U.S.C. § 2011. Congress has authorized the Secretary of Agriculture (Secretary) to formulate and administer the program. 7 U.S.C. § 2013(a); See 7 C.F.R. §§ 271 et seq. Participating states, such as Massachusetts, are responsible for the certi-

fication of applicant households and for the issuance and control of coupons. 7 U.S.C. § 2020(a).[3/] The states are also responsible for notifying households of any changes in benefits that may occur during the household's certification period. See 7 C.F.R. §§ 273.12-15 (1981).

When a particular household experiences a benefit reduction or termination due to a change in the factual circumstances for that household, the Secretary requires the states to issue a previously approved "notice of adverse action" which must contain certain information including the proposed action, the reason for the proposed action, the household's

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3/ Certification periods range from one month to twelve months. See 7 U.S.C. § 2012(c); 7 C.F.R. § 273.10(f)(1981).

right to request a fair hearing, the availability of continued benefits and a telephone number to contact for further information. 7 C.F.R. § 273.13(a)(2) (1981). However, certain changes initiated by the state or federal government which may affect the entire caseload or significant portions of the caseload, are considered by the Secretary to be "mass changes". 7 C.F.R. § 273.12(e) (1981). This case involves such a mass change, other examples being cost-of-living adjustments to federal benefits, annual adjustments to the shelter/dependent care deduction, or other changes based on legislative or regulatory action. Id. The Secretary leaves the format and content of a mass change notice to be determined by each state.

2. In August 1981, Congress passed the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 357 (1981), which required the states to implement spending reductions in numerous federal programs. Included among the budget cuts was an amendment to the Food Stamp Act of 1977, which lowered the so-called "earned income deduction" from 20 percent to 18 percent. Pub. L. No. 97-35, § 106; 7 U.S.C. § 2014(e).[4/]

4/ The amount of food stamp benefits an eligible household receives is based upon the household's total income. 7 U.S.C. § 2014. All wages and salaries from employment are considered earned income. 7 C.F.R. § 273.9(b)(1)(i)(1981). The "earned income deduction" permits a household to deduct a percentage of its earned income from its total income to compensate for taxes, other mandatory deductions from salary, and work expenses. 7 U.S.C. § 2014(e).

In November 1981, the Massachusetts Department of Public Welfare (Department) implemented the federally required change in the earned income deduction.[5/] In order to recalculate a household's benefits using the new statutory deduction, the Department simply had to enter a computer instruction applying the 18 percent, rather than 20 percent, deduction to existing financial information in each

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5/ During this same time period, the Department was implementing other OBRA-mandated changes in the Food Stamp Program as well as substantial changes in the AFDC program. See Pub. L. 97-35, §§ 101-116 and 2301-2336. The Food Stamp Program changes included adjustments to the thrifty food plan, standard deductions and eligibility of strikers, all of which could be phased in gradually. The changes also included an alteration in the gross income eligibility standard which, like the earned income deduction, was to be promptly implemented. See Pub. L. 97-35, §§ 101-110; 46 Fed. Reg. 44712, 44721-22 (September 4, 1981).

each household's file. No additional factual information for each household was necessary to implement the congressional action.[6/]

In determining the appropriate form of notification to the affected households, the Department was guided by the Secretary's rules governing the implementation of the OBRA changes. 46 Fed. Reg. 44712, 44722 (September 4, 1981). Since the statutory change affected a substantial number of households, the Secretary authorized the states to mail mass change notices to the affected households informing them of the legislative action. Id.

6/ The case does not involve any allegation that mathematical errors were made in applying the 18 percent rather than the 20 percent deduction.

3. At the end of November 1981, state officials mailed a mass change notice (the November notice) to more than 19,000 households identified as having earned income and, therefore, affected by the change.[7/] The November notice was printed on a blue card, one side in English, the other in Spanish, and inserted by machine into an envelope containing a computer card bearing the appropriate name and address. JA. 3. The November notice, dated "11/81", was entitled "IMPORTANT NOTICE -- READ CAREFULLY" and stated:

7/ A separate mass change notice was mailed to households terminated from the program because they exceeded the new gross income eligibility standard. JA. 56.

RECENT CHANGES IN THE FOOD STAMP PROGRAM HAVE BEEN MADE IN ACCORDANCE WITH 1981 FEDERAL LAW. UNDER THIS LAW, THE EARNED INCOME DEDUCTION FOR FOOD STAMP BENEFITS HAS BEEN LOWERED FROM 20 TO 18 PERCENT. THIS REDUCTION MEANS THAT A HIGHER PORTION OF YOUR HOUSEHOLD'S EARNED INCOME WILL BE COUNTED IN DETERMINING YOUR ELIGIBILITY AND BENEFIT AMOUNT FOR FOOD STAMPS. AS A RESULT OF THIS FEDERAL CHANGE, YOUR BENEFITS WILL EITHER BE REDUCED IF YOU REMAIN ELIGIBLE OR YOUR BENEFITS WILL BE TERMINATED. (FOOD STAMP MANUAL CITATION: 106 CMR: 364.400)

The next portion of the notice was entitled "YOUR RIGHT TO A FAIR HEARING" and went on to explain in detail administrative appeal procedures. JA. 3.

4. On December 10, 1981, four individuals commenced this class action on behalf of all households that received the November notice. PA. 45. The District Court certified the class and issued a temporary restraining order enjoining any benefit reductions based upon the November notice, for the reason that

it did not include a precise date from which households could compute their appeal period. PA. 45-46. In compliance with the District Court's interlocutory order, the Department mailed supplemental benefits to approximately 16,640 recipients in the amount of the December reduction. PA. 46.[8/]

At the end of December 1981, the Department issued a second notice (the December notice) dated December 26, 1981, to those 16,640 households. The December notice, written in English and Spanish, contained two cards - one yellow and the

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8/ The Department did not mail supplemental benefits to the remaining 3,000 households that received the November notice because they were no longer eligible for any food stamp benefits. JA. 249.

other orange.[9] The yellow card was entitled "IMPORTANT FOOD STAMP NOTICE, READ CAREFULLY" and provided a comprehensive explanation of the effect the temporary restraining order would have on their benefits and their appeal rights. The orange card was almost identical to the November notice.[10] It again informed the recipients of the changes in the federal law with regard to the earned income deduction. The notice again described in detail the recipients' administrative appeal rights, including their right to receive their former benefits

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9/ Both the November and December notices are reproduced in the Joint Appendix in their original size and format. See JA. 3-5.

10/ The plaintiffs sought a temporary restraining order enjoining the use of the December notice. The District Court denied that request. PA. 8.

pending an appeal and the procedures for filing an appeal.[11/]

In order to avail themselves of the appeal process spelled out in either the November or December notices, recipients simply needed to sign, date and return the form enclosed with the notice. PA. 48.[12/] By January 6, 1982, 331 households filed appeals from the November and December notices and continued to receive the higher benefits pending

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11/ The scope of such an appeal would be very limited as, of course, the action by Congress was not subject to challenge in these administrative proceedings. Aside from the simple arithmetic involved, the only question was whether a household had earned income subject to the deduction.

12/ An appeal that was requested by telephone or in person was also considered a valid appeal. PA. 48.

appeal. PA. 49. In total, 403 households appealed. PA. 49.

5. The two-day trial of this action to test the adequacy of the December notice was held on October 14 and October 16, 1982. Three recipients testified and one recipient filed an affidavit regarding the comprehensibility of the notice. One of these recipients, Cecelia Johnson, holds two bachelor's degrees. She is employed as a mental health worker by the Massachusetts Department of Mental Health. PA. 50-51. She has participated in public assistance programs intermittently for the past fifteen years. JA. 152. Johnson's testimony was that she did not understand whether her benefits were being reduced or terminated, and that her social worker was unable to provide an adequate explanation to her.

PA. 51. She subsequently filed a timely appeal and her benefit amount was not changed until the resolution of her appeal. JA. 151; Plaintiffs' Exh. 14.

Another recipient called by plaintiffs, Stephanie Zades, is a high school graduate and is employed as the manager of the electronics department for a toy store where her responsiblilities include reading instruction and operation manuals for home computers. PA. 54; JA. 133-34. She testified that she understood the words in the notice and understood that her benefits were going to be reduced or terminated but did not know which. JA. 130, 136. She has been on public assistance intermittently for fifteen years. JA. 134. Zades contacted her social worker, her attorney, and filed an appeal. JA. 131. Like Ms. Johnson, Ms.

Zades' benefits were maintained pending her appeal. JA. 132-33; Plaintiffs' Exh. 13. Court of Appeals App., Vol. II, 25.

Another recipient-witness, Gill Parker, is occasionally utilized as a reference by the Springfield Public Library as a game technician for which he is required to read and understand complex manuals. PA. 53; JA. 142. He has completed the eleventh grade. PA. 53. Parker testified that he read the notices and did not understand them. PA. 53. He contacted his social worker and his legal counsel and then filed an appeal. His benefits were not reduced, however, as a result of the OBRA change. PA. 53-54; JA. 139.

The only other recipient evidence offered by plaintiffs was contained in an affidavit by Madeline Jones, a high

school graduate, who is a senior aide in the Assessing Department of the City of Boston. PA. 55-56. She stated that she was unable to understand the November notice so she filed an appeal. PA. 56. As with the others, her benefits remained unchanged pending her appeal.

The District Court heard expert testimony from both sides on the question of the readability of the notice. JA. 187-210, 227-37. Statistical reading tests, which are intended to predict readability in terms of reading grade levels, were originally developed for educational publishers to determine whether grade school children will understand school textbooks. PA. 56; JA. 203. The most widely used reading formula, the Dale-Chall test, is a two-prong test based upon (1) a list of 3,000 so-called

"familiar" words known by at least 80% of children in fourth grade in 1948 and (2) average sentence length. PA. 58. Each word in a given reading sample which does not appear on the Dale list of 3,000 familiar words is considered "unfamiliar". The number of unfamiliar words is the principal factor in determining the level of difficulty of a given passage using the Dale-Chall test. PA. 58.

Page one of the December notice (the portion which explained the effect of the temporary restraining order), when tested by the Dale-Chall reading formula, had a readability level between the eighth and tenth grade. PA. 59. When applied to page two of the December notice, the Dale-Chall formula resulted in a wider grade range: between ninth and tenth grade, according to the Depart-

ment's expert, Dr. Culliton; between eleventh and twelfth grade, according to plaintiffs' expert, Dr. Conard. PA. 59-60.[13/] Test results for a given passage may range as widely as two to four years. JA. 207. It was agreed that the reader's purpose in reading and his interest and background in the subject matter are important factors to consider when determining comprehensibility. PA. 63.

13/ The December notice contained the following words which are deemed "unfamiliar" according to the Dale-Chall test and therefore increased the reading level predicted for page two of the notice: within, division, recent, federal, benefit, benefits, eligibility, eligible, appeal, reduced, reduction, deduction, request, action, local, welfare, recent, percent, disagree, terminated, computation, contact, enclosed, and current. PA. 60.

The depositions of two additional experts were introduced in evidence. Alan Haley, a commercial typographer, discussed the industry-wide standards for typography and opined that the notices issued by the Department fell short of acceptable industry practice. JA. 157-71. Mark Bendick, whose area of expertise includes the administration of public benefit programs, introduced a survey chart indicating the years of schooling completed by the heads of Massachusetts food stamp households with earnings. JA. 127.[14/] In Dr.

14/ Over 54% of the heads of such households have at least a high school degree. The remaining heads of households have completed eleven grades of schooling or less. JA. 127.

Bendick's opinion, because of the disparity between grade level completed and actual reading ability, the Department's notice should have been written so that it could have been understood by food stamp recipients who read at the sixth grade level. JA. 114.

Finally, the Court heard testimony with respect to errors which may have occurred in the implementation of this statutory change. The error rate for the issuance of food stamps generally is 13%. Of this total, 11% reflects overpayments (that is, benefits paid to households not otherwise entitled), and only 2% reflects underpayments. PA. 77. The plaintiffs introduced a sample, taken from the Department's computer printout, of 5,013 households that received the December notice. The sample showed that

211 households without earned income experienced a change in benefits. PA. 81. An additional factor considered was that during the months of October, November, and December 1981, there was some delay, due to the implementation of a new reporting system, in inputting new or changed household information in the Department's computer for AFDC recipients also receiving food stamps. PA. 79-80. This backlog was corrected by the end of December. PA. 79.

6. On March 24, 1983, the District Court issued over one hundred findings of fact, most of which summarized the evidence outlined above. PA. 42-84. The District Court concluded that the December notice failed to meet the requirements of the Due Process Clause. PA. 95.

This conclusion was based upon its finding that the notice failed to adequately inform recipients of the legislative change because it did not contain individual financial data for each household, because the wording, syntax, print size, and line lengths made the notice difficult to understand, and because there was a likelihood of error in the calculation of benefits. PA. 88-89, 96-97. The District Court also held, without discussion, that the notice failed to meet the "timely advance notice requirements" of the Food Stamp Act as well as the Secretary's requirements for individual notices of adverse action. PA. 98.

Although it did not find that any households were deprived of benefits to which they were ultimately entitled

under federal law, the District Court awarded retroactive benefits to all 16,000 members of the plaintiff class. PA. 101.[15/] The court also entered a permanent injunction prescribing the format and content of all future food stamp notices, and ordered the state to promulgate new regulations governing the legibility and comprehensibility of such notices. PA. 101-04.

7. The Court of Appeals, feeling constrained by the narrow standard of review required by Federal Rule of Civil Procedure 52(a) for factual findings, affirmed the District Court's conclusion

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15/ The retroactive award was to be computed by multiplying the amount of each household's monthly reduction times the number of months beginning January 1982 until the household's next certification of eligibility or termination from the program. PA. 101.

that the notice did not meet the requirements of the Due Process Clause. PA. 25. The Court of Appeals then held that if the notice was insufficient under the Due Process Clause, it did not meet the notice requirements[16/] of 7 U.S.C. § 2020(e)(10). PA. 28.[17/]

16/ It is not clear whether the Court of Appeals agreed with the District Court, that the notice was untimely. PA. 29-30.

17/ The plaintiffs suggest that this Court need not reach the constitutional question presented because both lower courts made independent findings that the notice violated § 2020(e)(10) of the Food Stamp Act. While the Commissioner is mindful of this Court's long-standing practice against unnecessary constitutional adjudication, resolution of the due process question is necessary to the disposition of this case. The Court of Appeals decision is predicated entirely upon a finding of a constitutional violation. The Court of Appeals merely added that since the notice did not meet the requirements of the Due Process Clause, then it could not have been adequate under the statute. PA. 31.

The Court of Appeals set aside the permanent injunctive relief awarded by the District Court as unnecessary and unwarranted. PA. 37-38. It also set aside the award of retroactive benefits to the entire plaintiff class "given the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated." PA. 33.

SUMMARY OF THE ARGUMENT

1. The lower courts' determination that the Department's December notice of an across-the-board statutory change was unconstitutionally incomprehensible and unconstitutionally illegible because of its language and format has no basis in the Due Process Clause. Due process requires of a notice only that individuals

be informed of the pendency of government action and of the opportunity to challenge that action.

The notice announcing the 1981 congressional lowering of the earned income deduction fully explained the legislative change and informed those affected by the change of the opportunity for an administrative appeal. The notice was written in language familiar to food stamp households generally, and the plaintiff class representatives in particular.

2. The lower courts erred also because the Constitution does not require that a notice announcing an across-the-board congressional change in the Food Stamp Program contain the individual financial information used to make the change or the precise effect of the

legislative change on each household's benefits in order to reduce the risk of erroneous deprivation. The Court of Appeals' unwarranted constitutional requirement of individualized notices each time a program change is announced displaces the statutory and regulatory policy which distinguishes between mass change notices and adverse action notices which inform an individual household of a benefit change as a result of a change in that household's particular factual circumstances.

The risk of error inherent in the implementation of the 1981 statutory change, which simply required the application by the computer of an 18% instead of a 20% deduction to existing household information, was minimal. The single

implementation error found, which involved at the most 4.2% of the plaintiff class, and which only affected those households receiving the minimum $10 benefit amount, was unrelated to the change in the earned income deduction and was, in any event, promptly discovered and corrected by the Department.

Although the lower courts focused solely on the notice and ignored the remainder of the Massachusetts due process structure, that structure further reduced the risk of erroneous deprivation by the post-notice safeguards available to the plaintiff class and to which the class representatives actually availed themselves. Without needing to state reasons and by the most convenient of procedures, a recipient could claim an appeal which would automatically freeze the house-

hold's benefits at the higher level until the Department could justify the application of the statutory change to the household. If a household prevailed at the hearing, or after judicial review, its benefits were permanently restored. Thus, given the nature of this congressional change and the administrative remedies available to correct any error, the Department's notice posed a minimal risk of erroneous deprivation and met the requirements of the Due Process Clause.

3. The Court of Appeals' limited review under Rule 52(a) of the District Court's so-called "findings of fact" was not appropriate where the "findings" were not based on historical facts or credibility determinations. The Court of Appeals was in as good a position as the

trial court to make the predictions as to the risk of erroneous deprivation and the ability of the plaintiff class to read and understand the notice. Moreover, where, as here, the "findings" are so interrelated to the constitutional question whether due process was afforded, the Court of Appeals should have independently examined the District Court's undisputed subsidiary findings and the record to ensure that the significant constitutional question raised by this case was correctly decided.

ARGUMENT

I. THE NOTICE, WHICH INFORMED HOUSEHOLDS THAT CONGRESS HAD LOWERED THE EARNED INCOME DEDUCTION AND GAVE THEM AN OPPORTUNITY TO PRESENT THEIR OBJECTIONS, SATISFIED THE REQUIREMENTS OF THE DUE PROCESS CLAUSE.

A. Each Of The Affected Households Received A Notice Fully Conveying The Required Information On The Congressional Action.

The threshold issue in this constitutional attack on the form of the Department's notice is the appropriate standard that should be used to test the adequacy of a notice under the Due Process Clause.[18/] Because this case involves

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18/ Since the Department was required by federal regulation to issue a notice informing households of the statutory change, the Commissioner does not address the issue whether the Due Process Clause requires any individual administrative notice prior to the effectuation of statutory changes in welfare benefits.

the adequacy of only the notice segment of the due process bulwark, the Commissioner believes that the appropriate standard for review of the notice is to be found in this Court's notice cases -- principally Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950).[19/] Mullane holds that "[t]he fundamental requisite of due process of law is the opportunity to be heard." Id. at 314 quoting Grannis v. Ordean, 234 U.S. 385, 394 (1914). In order for the opportunity to be heard to have any meaning, one

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19/ The Court of Appeals viewed Mathews v. Eldridge, 424 U.S. 319 (1976), as controlling the determination of whether the notice afforded plaintiffs due process. PA. 20. The District Court scrutinized the notice under both Mathews and Mullane. See PA. 96-98. The Commissioner addresses the incorrect application of the Mathews analytical framework by the courts below in section IB, infra.

must be "informed that the matter is pending. . . ." Id. Notification of the pending action satisfies the Due Process Clause if it apprises "interested parties of the pendency of the action and afford[s] them an opportunity to present their objections. . . . The notice must be of such a nature as reasonably to convey the required information. . . ." Id. (citations omitted).20/

Viewed under this standard, the December notice fully conveyed the required in-

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20/ More recent decisions in which the adequacy of a notice was challenged apply this standard. E.g., Mennonite Board of Missions v. Adams, 103 S. Ct. 2706, 2709 (1983) (notice by publication and posting to mortgagee of a proceeding to sell mortgaged property held insufficient under Mullane); Greene v. Lindsey, 456 U.S. 444 (1982) (service of process in forcible entry or detainer proceedings by posting held insufficient under Mullane).

formation about the congressional action. Written in English and Spanish and mailed to each household, the notice informed each household that its food stamp benefits were about to be reduced or terminated because of "changes . . . made in accordance with 1981 federal law," that a recipient could request a fair hearing if he or she disagreed with the intended action, and that current benefits would be maintained or reinstated pending the outcome of the fair hearing. JA. 5. The notice explained the change in the law as one which lowers the earned income deduction from 20% to 18%, and further explained this change by stating that, in the future, "a higher portion of your household's earned income will be counted in determining your eligibility and benefit amount for food stamps." JA. 5.

Thus, the notice conveyed to each affected household the essential information about the reduction in the earned income deduction. Further, the notice was "reasonably calculated" to inform each household of "an opportunity to present their objections", Mullane, 339 U.S. at 314. Accordingly, the Department's December notice meets the applicable due process standard for notice to persons who may be affected by governmental action.

The lower courts' holding that the notice did not adequately inform households of the congressional action was based in part upon the conclusion that the language of the notice was too complex to be understood by those receiving the notice and that the format (i.e., the use of all capital letters, the type

size, and length of lines) contributed to the complexity of the notice. PA. 21, 96-97.

The unusual manner by which the District Court undertook to assess the constitutionality of this mass change notice is wholly unrelated to the simple requirements of the Due Process Clause. Its adoption by the Court of Appeals was error.

In reaching its conclusion that the language of the notice was too difficult to pass constitutional muster, the District Court relied upon reading experts who predicted the difficulty of the notice by employing the Dale-Chall test, a statistical formula that is largely based upon measuring the vocabulary used in the notice against a list of 3,000 words known to fourth graders some 35 years

ago. PA. 58. Thus, for example, the District Court found that most of the words in the notice contributed to what it found to be unconstitutional incomprehensibility. Among these constitutionally offensive words are the basic vocabulary of any welfare notice: "eligible", "appeal", "reduction", "action", "disagree", "welfare", "certification", "benefits", "recent", "federal". PA. 60, 64.[21/]

The Commissioner leaves to reading specialists the debate as to whether the Dale-Chall test is a helpful tool in designing texts for today's school children. For the courts to use such a test to assess the constitutionality of a

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21/ Other commonplace words such as "television" and "computer," are also not on the list of familiar words. JA. 206.

welfare notice, however, is to adopt a seriously flawed approach to constitutional adjudication. To suggest that a certain passage in a welfare notice sent to adults is less protective of due process because it includes such words as "welfare" is to ignore the realities of modern life.

Against these reading test results, which showed that the notice tested between the eighth and twelfth grade, see PA. 59-60, the District Court compared the grade levels completed by Massachusetts food stamp households. Almost 55% of the heads of Massachusetts food stamp households have either a high school degree, some college education or a college degree. JA. 127. This is the education level, according to plaintiffs' reading specialist, that was necessary

to understand the notice without taking into consideration the recipients' background and familiarity with food stamp notice forms and vocabulary.[22/] It is the apparent disparity between the reading level of the notice and the grade levels completed by all the food stamp heads of households which was the basis for the conclusion by the courts below that the notice was unconstitutionally incomprehensible to Massachusetts recipients.

The District Court conclusion that the language was unconstitutionally difficult is not based upon the testimony

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22/ According to the Department's reading expert, however, page two of the December notice tested at a ninth to tenth grade level. The evidence showed that over 85% of the heads of Massachusetts food stamp households with earnings completed nine grades of schooling or more. JA. 127.

of the three witness-recipients. The recipients testified that although they did not understand the precise effect of the legislative change, they knew the meaning of the words used in the notice. See, e.g., testimony of Stephanie Zades, JA. 136-37; testimony of Gill Parker, JA. 145. In addition, each recipient indicated a familiarity with welfare notice forms, and the terms and concepts they contained. See, e.g., JA. 155-56.

As to legibility, the District Court, relying on the testimony of a commercial typographer,[23/] found "[t]he length of the lines in the December notice are from two to three times longer than that which

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23/ The notice was not printed by means of typography; it was typed on a typewriter.

is considered acceptable for text copy . . . . Considering the size of the point used and the line length, there should have been two points of additional line spacing . . . The production quality of the December notice includes the following: page one is overinked, creating black spots in the text, while page two is underinked, resulting in a grey copy." PA. 68-69.

No one can dispute that it is preferable to issue a food stamp notice that is properly "inked", contains lines of suitable length and that does not contain a complex phrase such as "earned income deduction". But it does not necessarily follow that the absence of such features render a notice of a congressionally mandated program change unconstitutional. By relying on plaintiffs' outside experts

schooled in reading, typography, and efficiency in the administration of welfare programs to judge the adequacy of the Department's notice under the Due Process Clause, the courts below lost sight of the purpose of due process and the standard by which a notice should be judged.

Those agencies and officials charged with informing households of statutory changes in public benefit programs must be guided by the well-settled due process principles announced in Mullane. Yet, it is clear from the decisions below that the Department's notice was not reviewed to determine whether it reasonably conveyed the required information; rather, it was dissected, scrutinized, and measured against standards and obligations which are unrelated to the language and purpose of the Fourteenth Amendment. The

lower courts effectively imposed obligations on the states, under the aegis of the Due Process Clause, which neither Congress nor the Secretary saw fit to require as part of the administration of the Food Stamp Program.[24/] Cf. Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558 (1978) (courts should refrain from imposing procedural requirements on agencies which are not required by statute).

The type of after-the-fact review of mass change notices sanctioned by the

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24/ Although the Court of Appeals vacated the District Court's injunction requiring regulations setting forth prescribed standards for legibility and comprehensibility as "unnecessary and unwarranted," it will be necessary for the states to employ reading experts simply to meet their obligations under that Court's view of what the Due Process Clause requires of mass change notices.

Court of Appeals will impose needless burdens on every state in the name of due process. The inescapable consequence of the lower courts' holding is that a state must engage in something akin to market research each time it apprises pertinent citizens of a congressional change in benefits law. The notice will have to be matched to the reading abilities of the particular group receiving the notice. Notwithstanding the District Court's finding to the contrary, given the complex statutory and regulatory framework for most public assistance programs, including the Food Stamp Program, explaining statutory changes with words that are contained in the list of 3,000 words familiar to fourth graders in 1948 is a formidable task. See Greene v. Lindsay, 456 U.S. at 451 quoting North Laramie Land Co. v.

Hoffman, 268 U.S. 276, 283 (1925)(notice "must be judged in the light of its practical application to the affairs of men as they are ordinarily conducted.").

Notices that can be understood by an adult who reads at the fifth-sixth grade level may, indeed, be desirable. To incorporate such a requirement into the Fourteenth Amendment would be a disaster. The ultimate validity of administrative action will depend upon the outcome of a battle of experts in the courts, long after the action has been taken. This after-the-fact factual inquiry into the adequacy of a notice can be a "virtual engine of destruction" with respect to an agency's execution of its mandatory, statutory duties. Cf. Weinberger v. Salfi, 422 U.S. 749, 772-73 (1975) (application of irrebutable presumption

analysis to welfare legislation would invalidate countless legislative judgments which have been thought wholly consistent with the Fourteenth Amendment).

The paternalistic theory of due process adopted by the District Court and affirmed by the Court of Appeals, trivializes the concept of due process. It also threatens to destroy administrative flexibility and discretion by imposing a requirement that agencies provide the best notice possible, as determined after the fact by the courts. Although due process is a flexible concept, tailored to the context in which it is invoked, the lower courts went too far in requiring that the language communicated to citizens match their hypothetical reading abilities. The Fourteenth Amendment does not enact the Dale-Chall test.

B. Incorrectly Applying Mathews v. Eldridge, The Courts Below Concluded Erroneously That The Format And Content Of The Notice Contributed To A Risk Of Erroneous Deprivation And That There Was Probable Value In A Different Type Of Notice.

The Courts below measured the sufficiency of the Department's notice by utilizing the approach in Mathews v. Eldridge, 424 U.S. 319 (1976). The Commissioner believes that this case is controlled by the analysis in Mullane, not Mathews; yet even under Mathews, the notice of statutory change satisfied due process requirements.

Addressing the adequacy of hearing procedures, Mathews sets forth three factors that should be considered when determining whether such procedures are constitutionally sufficient:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Id. at 334-35.

The Mathews analysis has been utilized often to determine whether the opportunity for a hearing, prior or subsequent to, the deprivation of a liberty or property interest, is necessary and, if so, whether the hearing procedures are adequate.25/

25/ E.g., Mackey v. Montrym, 443 U.S. 1 (1979)(no hearing is necessary prior to suspension of drivers license); Schweiker

(footnote continued)

However, this Court has not applied the Mathews test to a notice case. The distinction between "notice" and "hearing" cases is marked clearly in Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13-19 (1978). In Memphis, a utility company's notice of service termination and hearing procedure were challenged in one action. The Court applied Mullane to examine the adequacy of the notice, Id. at 13-14, and Mathews to examine the adequacy of the hearing procedure, Id. at 17-18.

The examination of the format, language, and content of a single notice to determine whether it meets the require-

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(footnote continued)

v. McClure, 456 U.S. 188 (1982)(nature of hearing on disputed Medicare claims comports with due process).

ments of the Due Process Clause does not lend itself to the Mathews analytical framework. In particular, the second Mathews factor, "the risk of erroneous deprivation and probable value . . . of additional or substitute procedural safeguards", which looks to the protections afforded by administrative safeguards as a whole, should not be applied to a single aspect of the administrative process. Neither should the constitutionality of a notice depend upon an after-the-fact inquiry by the courts into the circumstances faced by a state agency implementing, in good faith, substantial federal program changes. Nevertheless, as the Commissioner shows below, even if the three-part Mathews test should be utilized to judge the adequacy of a notice, it was improperly applied in this case.

1. In Concluding That There Was A Risk of Erroneous Deprivation, The Courts Below Failed To Give Proper Weight To The Appeal Portion Of The Notice As Well As All The Available Administrative Safeguards.

Mathews examines the totality of the administrative procedures available to the claimant, from the agency's initial communication to the claimant up through the opportunity for judicial review, to determine whether there has been a deprivation of property without due process. Id. at 337-39. E.g., Mackey v. Montrym, 443 U.S. 1, 14-17 (1979). Cf. Parratt v. Taylor, 451 U.S. 527 (1981) (admittedly erroneous deprivation of property does not constitute a violation of the Due Process Clause where subsequent procedures are available to restore loss); see also Hudson v. Palmer, 52 U.S.L.W.

5052 (U.S. July 3, 1984). Here, however, the courts below focused exclusively on the perceived infirmities of only that portion of the notice that explained the legislative action. They virtually ignored the balance of the notice which fully informed households of their right to challenge the Department's action, their right to receive a continuation of benefits pending an appeal, and the precise manner in which they should claim an appeal.[26/]

26/ The appeal portion of the notice stated in capital letters:

YOUR RIGHT TO A FAIR HEARING:

You have the right to request a fair hearing if you disagree with this action. If you are requesting a hearing, your food stamp benefits will be reinstated at the current amount if your appeal is received

(footnote continued)

In Memphis, 436 U.S. at 14-15, a utility's termination notice was held inadequate because it did not apprise the customer of the availability of a procedure to challenge the termination. Memphis considered the information about a hearing procedure to be a critical as-

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(footnote continued)

by the division of hearing within 10 days of this notice. If your appeal is denied, the Department has the right to recover from you any added benefits which you received during the appeal process. You may still appeal this action after ten days, but you must do so within 90 days of the date of this notice. Otherwise, your request for hearing after that date will be denied. To request a fair hearing, you must sign and date the enclosed card on which your name and address are pre-printed and mail it to: Division of Hearings, P.O. Box 167, Essex Station, Boston, MA 02112. If you have questions concerning the correctness of your benefits computation or the fair hearing process, contact your local welfare office. You may file an appeal at any time if you feel that you are not receiving the correct amount of food stamps. JA. 5.

pect of the utility termination notice. Here, the Department's notice provided households with detailed information about the appeal process.

In addition to adequate notice of the appeal process, the actual administrative process afforded households a meaningful remedy. First, although the potential for factual disputes in this across-the-board statutory reduction was minimal, an appeal was not limited to a mistake in the application of this particular statutory change but could be claimed for any reason (or, theoretically, for no reason at all). Second, the appeal procedure was simple; a form enclosed with the notice merely had to be signed and dated and returned to the address listed on the notice. However, to ensure that valid appeals were not

lost on timeliness or other technical grounds, an appeal that was requested by telephone or in person was also considered a valid appeal. PA. 48. Third, households that filed timely appeals had their benefits restored pending the appeal. PA. 49. Fourth, an individual was given a full hearing before an impartial hearing officer and could present evidence as well as require the Department to justify its application of the earned income deduction change to the household's situation. Finally, the Department's final administrative decision in any of these cases was, as is universally true in any welfare determination in Massachusetts, subject to judicial review. Mass. Gen. Laws Ann. ch. 30A, § 14 (West 1979). If a household could show that a reduction of benefits

was unwarranted for any reason, the program provided for a full restoration of benefits. See Pub. L. 95-113, § 1301, 91 Stat. 958, 7 U.S.C. § 2023(b).

Each recipient-witness in this case took full advantage of the administrative appeal process. Each filed for an administrative appeal. PA. 52, 53, 55. The fair hearings for Ms. Zades and Ms. Johnson, which also included their appeal from unrelated reductions in AFDC benefits, resulted in a redetermination of both their food stamp and AFDC benefits.[27/] Although Mr. Parker filed an

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27/ The hearing officers did not find that Ms. Johnson and Ms. Zades had received less food stamp benefits than they were entitled; nonetheless, the Department was ordered to review their files to ensure that they received the proper amount. See Plaintiffs' Exhibits 13 and 14, Court of Appeals App., Vol. II, 25, 58.

appeal, his food stamp benefits actually increased in December, and thereafter, from $72.00 per month to $106.00 per month. PA. 53-54.

Given the extensive administrative safeguards available to each household to challenge and remedy any incorrect application of this legislative action, it is clear that the plaintiff class received all the "process" that was due in the circumstances of this congressional reduction in food stamp benefits.

2. The Decisions Of The District Court And the Court Of Appeals Are Based Upon An Improper Assessment Of The Risk Of Erroneous Deprivation.

The courts below focused almost exclusively on the second Mathews factor: "the risk of erroneous deprivation . . .

through the procedures used and the probable value, if any, of additional procedural safeguards," in concluding that, as a matter of constitutional law, this notice and all mass change notices must contain individualized financial data, so that a household could determine whether its benefits were properly calculated and, therefore, whether it should claim an appeal.28/

The lower court's assessment of the risk of erroneous deprivation was based, in large part, on unusual circumstances at the Department that existed at the time the notice was sent. The District Court found that due to the implementa-

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28/ The District Court concluded that this mass change notice should have contained each household's old benefit amount, new benefit amount, and amount of household earned income. PA. 100.

tion of numerous OBRA-mandated changes in other benefit programs as well as in the Food Stamp Program, there were delays in the entry of new or changed household data into the Department's computer and therefore many households could have received an incorrect January benefit amount. PA. 79.[29/] It was this admin-

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29/ The delays were attributable to the implementation of a pilot monthly reporting system in the AFDC program which affected about 9,000 food stamp households. PA. 79.

The District Court found that the computer backlog was corrected by the end of December. PA. 79. The record does not show whether any new or changed household information, which may not have been entered in the computer prior to the December cutoff date for calculating January benefits, resulted in overpayments or underpayments. The likelihood of overpayments, however, was at least as great as underpayments, as Congress has determined that the greater percentage of erroneous benefit payments under the Food

(footnote continued)

istrative backlog which the District Court improperly equated with a risk of erroneous deprivation stemming from the mass change notice.30/

(footnote continued)

Stamp Program are overpayments. The largest source of errors is the failure on the part of a household to report changes in household information instead of agency error. See H.R. Rep. 95-464, 95th Congress, 1st Sess. 353-58, reprinted in 1977 U.S. Code Cong. & Ad. News 2285-90. This is consistent with the error rate statistics in Massachusetts in 1981, which indicate a 13% incorrect payment rate--11% overpayments and only 2% underpayments. PA. 77.

30/ On this issue, the Court of Appeals decision contains a fundamental inconsistency. Although it accepted the District Court's conclusion as to the risk of erroneous deprivation, it reversed the award of retroactive benefits to the entire class "given the absence of any showing that a substantial percentage of these recipients had their benefits improperly reduced or terminated." PA. 33.

The proper risk assessment, however, focuses on the risk of error inherent in this notice of statutory reductions, see Mathews, 424 U.S. at 344-45, rather than an assessment of all pre-existing problems in case files which may have resulted in errors in the households' regular monthly benefits.31/

31/ The lower courts' method of analyzing the risk of erroneous deprivation, by including all possible errors from whatever source, is not only inconsistent with Mathews, it has far-reaching effects on the the administration of public assistance programs. Under the Court of Appeals decision, as a matter of constitutional law, state and federal agencies, when announcing even the most minimal statutory or regulatory program reductions, would be required to formulate an individualized notice that would alert recipients of not only potential errors stemming from the mass change, but also those errors which might result from inaccuracies in past applications, erroneous calculations, stale data, or any other source.

The risk of erroneous deprivation attributable to the implementation of this across-the-board statutory change in the earned income deduction was minimal. This federal statutory change did not require the adjustment, adjudication, or addition of any individual data in a household's case file. Cf. Goldberg v. Kelly, 397 U.S. 254 (1970)(termination of public assistance based upon individual factual circumstances). In cases involving such individualized factual determinations, the Secretary requires the Department to issue an individual notice of adverse action. 7 U.S.C. § 2020(e)(10); 7 C.F.R. § 273.13(a)(2)(1981).[32/] Nor did the

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32/ The individual notice of adverse action and fair hearing procedure, which involve a factual adjudication for a particular household, were incorporated into

(footnote continued)

statutory change require a total revision of the manner by which benefit amounts are computed. The statutory change simply required a computer recalculation of each household's benefits, utilizing existing financial and other relevant information.

Since there is no allegation or indication that the computer applied something other than the 18% deduction to each household's income, the only serious

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(footnote continued)

the Food Stamp Act in response to Goldberg v. Kelly, supra. See H.R. Rep. 95-464, 95th Congress, 1st Sess. 285-86, reprinted in 1977 U.S. Code Cong. & Ad. News 2220-22. Significantly, neither Congress nor the Secretary found that the same due process interests at the heart of Goldberg required individualized treatment in mass change situations. The judgment of those bodies, while not conclusive on this Court, is certainly entitled to consideration as the Court weighs the government interest as part of the Mathews balance.

risk of erroneous deprivation inherent in this particular statutory reduction involves households without earned income that may have had their benefits reduced. There were, in fact, certain households without earned income (but with other types of income such as AFDC benefits or social security) that had a benefit amount prior to the statutory change of $10 and who had their benefits reduced to less than the required $10 minimum. JA. 44.[33/] The District Court found that 211 of these 5,013 sample households without earned income experienced a change in benefits and, therefore, there was a serious risk of erroneous deprivation. It is undisputed, however, that

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33/ The Secretary's regulations require households with one or two people to receive a minimum of $10. See 7 C.F.R. § 273.10(e)(2)(iii)(B) (1981).

the Department promptly recognized this flaw in the computer program and corrected the error. JA. 49, 250.[34/] This single implementation error, which had nothing to do with the notice and was promptly corrected, reflects a 4.2% error rate. Assuming each error was an underpayment, 4.2% of the sample temporarily losing less than ten dollars of benefits hardly represents the serious risk of erroneous deprivation which warrants the conclusion that the notice was unconstitutional.

The Due Process Clause does not ensure an error-free implementation of entitlement programs. As this Court has stated,

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34/ There was no evidence at trial that any of these households did not have their benefits restored to the $10 minimum. Only then would they have suffered an erroneous deprivation.

> . . . [T]he Due Process Clause has never been construed to require that the procedures used to guard against an erroneous deprivation of a protectible 'property' or liberty' interest be so comprehensive as to preclude any possibility of error. The Due Process Clause simply does not mandate that all governmental decision-making comply with standards that assure perfect, error-free determinations. Mackey v. Montrym, 443 U.S. at 13.

The creation of methods to attain that objective is best left to Congress and to those agencies charged with administering the programs.[35/] E.g., Califano v. Boles, 443 U.S. 282, 285 (1979) ("Fairness can be best assured by Congress and the

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35/ Because of the significant problem of overpayments to households, Congress has, in fact, established a financial incentive mechanism designed to encourgage states to reduce the program error rate by withholding a share of administrative funds if the state's error rate exceeds a specified ceiling. See P.L. 95-113, § 1301, 91 Stat. 913, 976-77, 7 U.S.C. § 2025.

Social Security Administration through sound managerial techniques and quality control designed to achieve an acceptable rate of error.").

The District Court decision, as affirmed by the Court of Appeals, tests the constitutionality of this mass change notice in a manner which is not only inconsistent with established due process principles but conflicts with congressional policy. Congress has set forth explicit requirements for individual notices of adverse action. 7 U.S.C. § 2020(e)(10). In contrast, the statute is silent as to mass change notices. The result, which places an affirmative burden on the Department to issue mass change notices which include certain individualized data in each of 16,000 notices, indicates that the Court of Appeals failed to recognize that "[t]he

role of the judiciary is limited to determining whether the procedures meet the essential standard of fairness under the Due Process Clause and does not extend to imposing procedures that merely displace congressional choices of policy." Landon v. Plasencia, 459 U.S. 21, 34-35 (1982). The decisions below have ignored the clearly expressed statutory and regulatory policy which distinguishes between notices of adverse action and mass change notices. See H.R. Rep. 95-464, 95th Congress, 1st Sess. 289, reprinted in 1977 U.S. Code Cong. & Ad. News 2224-25.

3. The Probable Value Of A More Detailed Notice Was Not Significant.

The second part of a proper "risk of erroneous deprivation" analysis under Mathews is a determination of the prob-

able value of different procedures. The courts below concluded that a mass change notice that contained each household's old and new benefit amount, as well as its amount of earned income, would reduce the risk of erroneous deprivation. PA. 17-18, 90.[36/]

There is no support in the record for the District Court's finding that the probable value of a more detailed notice was great. Since the purpose of a notice is to apprise an individual of the pendency of an action and afford opportunity to chall ge that action, the only potential benefit of a more detailed notice is to provide a household with

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36/ The "value of different procedures" --which is the issue in Mathews--cannot necessarily be equated with the value of a more detailed notice, the question actually addressed by the courts below.

more or clearer information so that it can better determine whether to challenge the action.

There was no evidence at trial that any household was unable to determine whether to take an appeal because the notice did not contain individual financial information. The fact that all five recipients who represented the plaintiff class, and who claimed not to understand the precise effect of the statutory change, filed appeals, bears this out. PA. 50, 53, 55, 56.

In fact, it was the opinion of plaintiffs' expert on the administration of welfare programs that when a recipient is not given detailed notice of some agency action, or he is confused by a notice, he is more likely to appeal

or contact the agency by telephone. JA. 100.[37]

As stated earlier, the only possible erroneous deprivation inherent in this statutory change involved the 211 households that did not have earned income but who nonetheless experienced a brief and minimal (no more than $10) change in benefits.[38] The more detailed notice demanded by the courts below, which would show those households' earned income as zero, provides no more meaningful infor-

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37/ Plaintiffs' expert testified that increased calls and appeals will hamper the efficiency of public assistance programs. This, of course, is irrelevant to the issue whether the notice meets the requirements of the Due Process Clause.

38/ It bears repeating that there was no evidence to show that any of these households were actually deprived of food stamp benefits to which they were otherwise entitled.

mation than would a general notice. A recipient without earned income who receives a notice that his benefits may be reduced because of a change in the earned income deduction is put on notice that something may be amiss and is likely to contact a social worker, file an appeal, or both.[39]

Even assuming that the purpose of notice is to alert the household of any underlying errors in the Department's data, the added benefit of including the earned income figure on this mass change notice was challenged by the head of the

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39/ As noted earlier, a recipient need not specify a ground for appeal. A request for a fair hearing can serve the simple purpose of freezing the household's benefit level until the Department can justify to that household the correctness of its action.

Department's procedures and policy unit. He testified that the earned income figure actually in the computer system, and, therefore, capable of being produced on the notice might have been misleading to households and would have created as much confusion as assistance. JA. 254.[40/]

As this Court has recently stated, "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitle-

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40/ For example, not all types of earned income are included when determining benefits. Also, the Department uses a monthly earned income figure based upon 4.33 weeks in a month. Thus, for example, a recipient who knows that his weekly earned income is $25 might be confused by a notice which shows his monthly earned income figure as $108.25. JA. 254.

ment." Olim v. Wakinekona, 103 S. Ct. 1741, 1748 (1983). In order to protect those households without earned income who do have a substantive interest in receiving benefits unaffected by the statutory change, a general notice announcing the statutory reduction is sufficient. Due process only "calls for such procedural protections as the particular situation demands." Mathews, 424 U.S. at 334 quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1982). Cf. Codd v. Velger, 429 U.S. 624, 627 (1977) (per curiam) (where there is no factual dispute, due process does not require a hearing).

Accordingly, the conclusion that a more detailed notice in the mass change context is constitutionally required is unwarranted.

II. THE LIMITED STANDARD OF REVIEW USED BY THE COURT OF APPEALS EFFECTIVELY PRECLUDED APPELLATE REVIEW OF A SIGNIFICANT CONSTITUTIONAL QUESTION.

In its review of the District Court decision, the Court of Appeals limited itself to the restrictive standard of review set forth in Fed. R. Civ. P. 52(a):

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The Court of Appeals stated, "[i]n affirming the court's conclusion that the December notice was constitutionally inadequate, we stress the limited scope of our review . . .", PA. 25-26, and noted that it could reverse the District Court only if it had "the definite and firm conviction that a mistake has been com-

mitted." PA. 20. Thus, the Court of Appeals held, "we do not find clearly erroneous the District Court's conclusion that there was substantial risk of calculation error." PA. 23. The Court of Appeals also held that the District Court, in concluding that the December notice was difficult to read, relatively difficult to comprehend and ambiguous, did not commit clear error. PA. 21.

The application of this limited standard to review the District Court's decision that the plaintiff class was not afforded due process under the Fourteenth Amendment is improper for two reasons. First, the "facts" relied upon by the District Court are not the type of facts that Rule 52(a) is intended to govern. Second, even if they were the type of facts entitled to deference under Rule

52(a), they are so interrelated to the ultimate constitutional question as to require independent review.

Rule 52(a) itself incorporates the fundamental rationale underlying deference to the trial court's findings of fact: the opportunity of the trial court to judge the credibility of the witnesses. United States v. Gypsum Co., 333 U.S. 364, 395-96 (1948).[41] See also United States v. Oregon Medical Soc., 343 U.S. 326, 332 (1952) ("[t]here is no case more appropriate for adherence

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41/ Rule 52(a) was intended to make applicable in all actions tried without a jury the then prevailing equity practice: "that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would be best judged, had great weight with the appellate court." Id. at 394-95.

to [Rule 52(a)] than one in which the complaining party creates a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses.").

This Court has recognized that not all "facts" found by the trial court are entitled to the Rule 52(a) deference.

> "[I]ssue of fact" is a coat of many colors. It does not cover a conclusion drawn from uncontroverted happenings, when that conclusion incorporates standards of conduct or criteria for judgment which in themselves are decisive of constitutional rights. Such standards and criteria, measured against the requirements drawn from constitutional provisions, and their proper applications, are issues for this Court's adjudication. Watts v. Indiana, 338 U.S. 49, 51 (1949) (citation omitted).

This litigation involving the adequacy of a notice under the Due Process Clause, when either the Mathews balancing

test or the Mullane standard is utilized, does not present fact questions which are entitled to deference by an appellate court. Whether the language and format of a notice poses a "risk of erroneous deprivation" or whether it is "reasonably designed to convey the required information" does not require resolution of historical facts which turn on issues of credibility. In this case, the relevant factual questions as to error and the statistical reading test results were undisputed. The District Court findings were, instead, determinations of a predictive nature which did not depend upon the unique opportunity of the trial court to observe the witnesses' demeanor. Whether the language of the notice was appropriate to inform over 16,000 households of the congressional action or

whether the line lengths and print quality were constitutionally adequate are questions of judgment which any appellate court is in as good a position to make as the trial court.[42/] Even if the District Court findings were of the sort that depended on historical or credibility determinations for their resolution, they are so fundamentally intermingled with the ultimate consitutional question as to require independent review. This past term in Bose Corp. v.

42/ The District Court's findings as to the risk of erroneous deprivation and comprehensibilty can also be viewed as mixed questions of law and fact because they involved the application of admitted facts to the rule of law set forth in Mathews and Mullane. The propriety of using this limited standard to review such mixed questions is also questionable. See Pullman-Standard v. Swint, 456 U.S. 273, 289-90 n.19 (1982).

Consumer Union of U.S., Inc., 104 S. Ct. 1949, 1953 (1984), this Court affirmed the First Circuit's independent review of a District Court "determination that a false statement was made with the kind of 'actual malice' described in New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). . . ." Bose continued a long line of decisions under the First Amendment which hold that judges have a duty to review independently at least those factual matters which determine a constitutional question.[43/]

43/ E.g., New York Times Co. v. Sullivan, 376 U.S. at 285; Norris v. Alabama, 294 U.S. 587, 589-90 (1935); Jacobellis v. State of Ohio, 378 U.S. 184, 189 (1965); Estes v. Texas, 381 U.S. 532, 567 (1965) (Warren, C.J., concurring); Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

The rule of "independent review" has not been limited to First Amendment cases, however. In Watts v. Indiana, 338 U.S. 49, 51 (1949), the rule of independent review was applied to a case decided under the Due Process Clause of the Fourteenth Amendment. The Court commented:

> Especially in cases arising under the Due Process Clause is it important to distinguish between issues of fact that are here foreclosed and issues which, though cast in the form of determinations of fact, are the very issues to review which this Court sits. (citations omitted).

While the underlying rationale for undertaking independent review of both legal and factual matters has been to ensure the safeguarding of constitutional rights, Norris v. Alabama, 294 U.S. at 590; Bose, 104 S. Ct. at 1965, independent review also serves to ensure that

constitutional questions raising significant public policy issues are correctly and consistently decided by the lower federal courts.44/

In cases involving the construction of the Due Process Clause, "the stakes --in terms of impact on future cases and future conduct--are too great to entrust them finally to the judgment of the

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44/ Indeed, the standard of review adopted by the Court of Appeals deprives the Court of the ability to ensure the uniform application of the Due Process Clause even in its own circuit. It is certainly possible that a district judge in New Hampshire, for instance, could have "found", on an identical trial record, that the risk of error in implementing the mass change was minimal or that the notice was sufficiently comprehensible as to be constitutional. Under the Court of Appeals approach to Rule 52(a), the same notice would thus be constitutional in New Hamphsire but not in Massachusetts.

trier of fact." Bose, 104 S. Ct. 1960 n.17.45/

An independent review of the District Court's subsidiary findings as well as the undisputed facts in the record itself uncovers the flaws in the District Court's conclusion that the notice did not meet the minimal requirements of the Due Process Clause. Several examples are instructive. With respect to the comprehensibility of the notice, the Court of Appeals affirmed the District Court's findings that the notice was incomprehensible to many of the recipients.

45/ Appellate Courts should not be precluded from reviewing "broadly social judgment--judgments lying close to opinion regarding the whole nature of government and the duties and immunities of citizenship." Id. at 1959 n.16 quoting Baumgartner v. United States, 322 U.S. 665, 670-71 (1944).

PA. 9. While both courts relied on the statistical reading test results for this finding, other findings ignored by the Court of Appeals show that comprehensibility determinations cannot be made without considering "[t]he reader's background, interest, and motivation in the subject matter . . . ." PA. 63.

> Those readers who have no interest or background in the subject matter of certain reading material may find little meaning in it; for other readers who were interested in the subject, the same reading material may be most comfortable readings. This difference in ease of reading and comprehension may exist even though both groups of readers have completed the same years of schooling and have the same general reading ability on a standardized reading test. PA. 63-64.

The evidence showed that food stamp households have a substantial "background" in the language of food stamp

notices. The very words that were deemed "unfamiliar" and, therefore, contributed to the reading grade level of this mass change notice, appear on every food stamp form that households receive on a periodic basis. Finding no. 55, for example, reads:

> "At the [household's] initial certification and all subsequent recertifications, households must complete an "Application Form." Contained in the application form are the words action, apply, eligible, benefits, deductions, information, fair hearing, disagree, hearing, eligibility." PA. 65.

These same words appear in the "change of report form" which must be filled out each time household has a change in its income, expenses, or household size, and the "recertification of eligibility form"

which is filled out and submitted at every recertification. PA. 66-67.[46/]

The flaw in applying, and relying upon, a statistical reading test to predict comprehensibility of this mass change notice is made clear by evidence that all the witness-recipients themselves understood the words in the notice. The record shows unequivocally that they knew that their benefits would be reduced or terminated because of a congressional action and they understood, and took advantage of, the administrative appeal process.

Finally, it is the Court of Appeals affirmance of the District Court's

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46/ Plaintiffs' reading expert admitted that she did not examine the Department's forms and notices that were periodically sent to every food stamp household and which contained the so-called "unfamiliar" words. JA. 207-08.

"finding" of a substantial risk of error which best states the case for adopting the rule of independent review. The District Court's conclusion that the notice lacked sufficient detail to meet the requirement of the Due Process Clause, is in large part based upon its finding of a substantial risk of erroneous deprivation inherent in the Department's general notice. Even though the Court of Appeals expressly deferred to this finding, PA. 23, it also recognized that there was "an absence of any showing that a substantial precentage of these recipients had their benefits improperly reduced or terminated." PA. 33. The record, in fact, does not show a single household that did not receive all the benefits to which it was entitled. This deference to the District Court on a

critical factor in the Mathews rule is incorrect, and, as the Court of Appeals itself acknowledged, not supported by the evidence.

The Department's elimination of its backlog by the end of December, PA. 79, its correction of the computer program relating to those 211 households without earned income, JA. 49, 250, and existence of a protective appeal mechanism afforded to all households and to which the class representatives availed themselves, clearly show that the "finding" of a substantial risk of erroneous deprivation is incorrect.

Accordingly, the Court of Appeals' limited review of the District Court's decision, particularly those "findings" relating to the risk of erroneous deprivation and comprehensibility, deprived

the court of its proper authority to review a significant constitutional question the result of which sets forth extraordinary due process requirements for the future. An independent examination of the District Court's own subsidiary findings as well as the record in this case reveals the error in the Court of Appeals conclusion that the Department's notice did not meet the requirements of the Due Process Clause.

CONCLUSION

For the foregoing reasons the Massachusetts Commissioner of Public Welfare requests that the decision of the Court of Appeals declaring the Department's notice unconstitutional be reversed.

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